No. 11,694

IN THE

United States Court of Appeals

For the Ninth Circuit

National Labor Relations Board,
Petitioner,

vs.

Scientific Nutrition Corporation d.b.a. Capolino Packing Corporation,
Respondent.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L., and California State Council of Cannery Unions, A.F.L.,
Plaintiffs in Intervention,

vs.

National Labor Relations Board,
Defendants in Intervention.

BRIEF FOR INTERVENORS.

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BRIEF FOR INTERVENORS.

I. STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked by petitioner, as we understand its position, under Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. 160 (e)) hereinafter called the "Act". The Act was amended by the Labor Management Relations Act of

1947. (Pub. L. No. 101, 80th Cong., 1st Sess., June 23, 1947, 29 U.S.C.A. Sec. 141 et seq. (1947 Supp.).)

II. STATEMENT OF THE CASE.

This case involves the construction of a collective bargaining agreement between the Capolino Packing Corporation, a subsidiary small cannery of the Scientific Nutrition Corporation, and its employees. No great or new principles of law are necessary for disposal of the issues. The intervenors and the respondent contend that the letter of their written agreement constituted a closed-shop agreement. The Board states that it does not. The intervenors and the respondent assert that they were justified in interpreting and administering it as a closed shop agreement. This the Board also denies.

For many years prior to the single event which produced this case, the parties to the contract, agreeing upon its meaning and administration, proceeded in industrial accord. Indeed, this harmony continued thereafter, despite the shadow thrown upon it by the Board's order. However, the Board would now distort the involved contract into an instrument which the parties proposed and conceived to be an agency of inevitable discord. If the Board's position is correct, the parties contemplated and, indeed, guaranteed for themselves recurrent and unresolvable work stoppages.

The Board's invocation of the Wagner Act to create this minor but certain source of industrial strife and unrest is a strange distortion of its role.

It is the more strange because the Board originally conceived and tried the case, not upon the theory that the contract constituted an open shop agreement, but upon the thesis that the agreement had been unlawfully procured by illegal assistance of the employer. The open shop contention came as an after-thought of the Board.

Unsound and distorted, the contention grew out of a curious history. The charge, upon which this complaint rests, was filed by a C.I.O. union which did not even enter the picture until almost one year after the alleged unlawful discharge occurred. Instead the charge was filed by an organization which became defunct three months thereafter (R. 170), and the charge itself was dropped. It was this organization that had originally petitioned for an election, but, in October, 1945, had lost the election, the employees choosing the intervenor as their collective bargaining agency. (Record, N.L.R.B. v. C. W. Hume Co., Vol. II, p. 612.) On April 22, 1946, the FTA-CIO, a second rival organization in the industry, filed a charge alleging that the respondent had committed unfair labor practices as to the first contending labor union at a time before FTA-CIO had even come upon the scene, and five months prior to the election; indeed, ten months prior to the filing of the charge! (R. 3-5.) It was this dilatory charge which gave delayed birth to the present proceedings and consequent order of the Board sought to be enforced here.

We believe the Board has been less judicial than punitive. To sustain its belated complaint it would ordain a retroactive decree destroying a collective bargaining contract and establishing industrial misunderstanding and

possible strife. The Board would thus use the Wagner Act to work a result as unjust from a moral standpoint as it is unsupportable procedurally and substantively.

A. THE FACTS.

1. Early bargaining relations between the respondent and Local 22382.

The history of this case begins in 1941 when the Capolino Packing Corporation entered into an agreement with a local union of the A. F. of L. designated as Federal Local 22382. (R. 43, 214-215.) The contract which the company consummated with this union on March 1, 1941, ran from year to year unless notice of intention to modify was submitted at least fifteen days prior to the end of the calendar year. (Pet. Brief p. 47.)

During the period 1941-1945 the company continued to bargain only with Local 22382. While the master contract entered into between the employers' association, California Processors and Growers, Inc., and the union's representative, the California State Council of Cannery Unions (R. 43, 198, 214-215), set the pattern for its collective bargaining contract, Capolino Packing Corporation retained its independent status, stipulating to accept such terms as the master contract provided and settling all disputes and grievances locally. Respondent did not become a member of the California Processors and Growers (R. 174); nor is there any evidence that it was aware of the history of the master agreement which the parties utilized as a prototype for the contract at the small plant at Atwater, California.

The relations between the parties to the contract were cordial (R. 179) and, in the memory of the witnesses, every employee was a member in good standing in the A.F.L. Local 22382. (R. 138, 141-142, 174-175.) The Capolino Packing Corporation had even instituted a union dues check-off system (R. 128, 152) at the request of the A.F.L. Local (R. 151) and maintained this check-off until early in 1945. (R. 152, 216, 223.)

In 1944 Capolino sold his plant to the respondent (R. 43-44; 152, 215, 220) but the respondent continued to operate the plant with Capolino as manager and maintained the collective bargaining agreement in effect. (R. 215, 216, 217.) The dues check-off system was, however, discontinued in January, 1945. (R. 223.)

2. The Teamster succession to the bargaining status of Local 22382.

During this period Local 22382 remained an unaffiliated federal local union of the American Federation of Labor (R. 43, 107-108, 220, 234) but during the early months of 1945, there developed a movement among the membership of some cannery locals to obtain the status of an international union or affiliation with an international union of the American Federation of Labor.

As a result, at the meeting of the Executive Council of the American Federation of Labor April 30-May 8, 1945, the Council ruled that jurisdiction over the cannery workers should be assigned to the International Brotherhood of Teamsters. (R. 234.) To implement the transfer the American Federation of Labor, through its president, on or about May 10, 1945, appointed a trustee, charged

with the duty of effecting an orderly succession. (R. 234.) Concurrently with the award of jurisdiction to the Teamsters, the International representative of the Teamsters notified the Scientific Nutrition Co. (Mr. Capolino, specifically) by letter dated May 8, 1945, that the Teamsters had succeeded as the governing agency of Local 22382 and requested recognition, promising in turn to administer the existing agreement "to the letter." (R. 186-187.)

Some time in this period a group of discontented workers who objected to the Teamster affiliation formed an organization known as the Cannery and Food Process Workers' Union. This organization evidently held meetings in April, 1945, (R. 207) and attempted to affiliate with a group known as the Pacific Coast Council of Cannery and Food Process Workers Union. The latter organization in turn attempted to affiliate with the Seafarers' International Union. (R. 235-236.)[1] However, on April 26, 1945, the American Federation of Labor notified the Seafarers' International Union that it had no jurisdiction over the cannery unions (R. 236) and the above-mentioned Cannery and Food Process Workers' Union, in September or October, 1945, (R. 154), thereafter, became defunct.

3. Respondent's behavior subsequent to the Teamsters' succession to Local 22382.

Very likely the entire controversy would not have eventuated if the respondent had complied, without question, with the Teamsters' letter of May 8th, 1945. However, an

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[1]The sequential background of the dispute was narrated by counsel for Intervenors at the request of the Trial Examiner. (R. 221, 223.)

odd circumstance gave him pause. The secretary-treasurer of Local 22382, a Mr. Tomson, a leading figure in the attempt to lead the membership of the Local into affiliation with the Cannery and Food Process Workers Union, sent a letter, dated May 11, 1945, to the Capolino Packing Corporation. The letter, purportedly written in Tomson's representative capacity as organizer for the "Cannery and Food Process Workers' Council of the Pacific Coast", advised the Company that the Council was prepared "upon request of the Local Union to represent the Local Union and the employees in your plant in collective bargaining matters", after first stating that the employees had "terminated their membership in Local 22382 and have * * * organized under the name of Cannery and Food Process Workers' Union of Modesto * * *". (R. 205, 206.)[2]

After a "trivial conversation" between McIsaac, plant superintendent of the Capolino plant, and Capolino, they decided "to put the issue before the employees, tell them to make some decision so (respondent) could get down and operate our plant reasonably." (R. 207, 208.) Accordingly, on the following Monday the employees were assembled and notified of the receipt of the letter from the Teamsters. (R. 178.) The exact words of Capolino during this meeting are in dispute. McIsaac testified:

> "He * * * asked the employees to get together and decided what union they would like to affiliate

[2]As we have noted, supra, "The Cannery and Food Workers Council" expired (if indeed it ever existed) after the disavowal of jurisdiction by the Seafarers International Union. (R. 235-236.) The concern of respondent over the presumptuous claim in this letter was, therefore, unnecessary.

with, that he was afraid this was going to lead to a lot of trouble and possibly shut the plant down; that all he was primarily interested in was to keep the plant running, that he did not care who they affiliated with or joined; if they joined up with the devil it would be all right with him. All he wanted was peace amongst his employees and to operate the plant." (R. 178, 179.)

Cedar, the discharged employee, testified:

"He said that he had received notice that the Teamsters Union were going to take over the plant, and there was nothing we could do about it, and he wanted to know what we are going to do about it." (R. 111.)

"* * * he also said, 'If you don't go with the Teamsters they will quit delivery, the plant will be tied up and we will all be out of work'."[3] (R. 111.)

The letter received from the Teamsters was posted in the plant and later in the day four representatives of the Teamsters called at the plant and inquired whether the Company intended to carry out the agreement. The Company informed them that they would not do so until proof of their designation by the employees was supplied. (R. 181.) The Teamsters requested permission to address the employees and the permission was granted. McIsaac assembled the employees and informed them:

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[3]The Trial Examiner credited the testimony of Cedar (R. 47) despite the fact that he was hazy on the date of the meeting and contradicted details of his testimony in later examination, i.e., although Cedar testified, as above quoted, that Capolino had stated he had "received notice that the Teamsters Union were going to take over * * *", Cedar later stated in response to the question, "Was any reference made to any letters from the Teamsters?": "Not at that time". (R. 112.)

> "* * * there were representatives of the Teamsters Union who would like to talk to them, but it was entirely up to them whether they wanted to listen to it. Whatever they wanted to do was entirely up to them. They could feel free to stay and listen to it or go on back to their work. It wasn't necessary for them to take any action, do anything, merely listen." (R. 181, 182.)

This testimony was not contradicted by Cedar.

During this second assemblage of the employees, officers and members of Local 22382 stated their reasons for the affiliation with the Teamsters and the advantages of the affiliation (R. 183) and later solicited cards evincing approval of the succession from the individual employees. (R. 116, 117.) It must be pointed out that there would have been no need for this solicitation had the respondent recognized the succession upon demand of the International representative; indeed, the fact that within two days the Teamsters presented signed applications from a clear majority of the employees (R. 184) is strongly indicative of the fact that respondent's refusal to recognize the Teamsters upon written application was born of an unnecessary caution.

The presentation of proof of the Teamsters' clear majority satisfied even the careful respondent, and, on May 18, 1945, it recognized the Teamsters as the exclusive bargaining representative under the current bargaining agreement. (R. 20, 189.)

Upon execution of the agreement with the Teamsters, McIsaac assembled the employees and verbally informed them that it had signed the contract (R. 211, 212) and a

few days later the local officials of the Union came to the plant and showed the contract to the employees. (R. 208, 212.)

On June 22, 1945, the Teamsters served written demand upon the respondent to discharge Gus Cedar for failure to join the Union. The discharge for this cause was stated to be "in accordance with the terms of the agreement between your company and Local 748". (R. 191, 192.) Upon receipt of the letter, Cedar was discharged for failure to join the Union. (R. 102-103.)

B. THE BOARD'S DECISION AND ORDER.

The Board held that the Cedar discharge violated the Act because the Company did not have a closed-shop contract with the Teamsters.

The Board does not controvert the fact that the Teamsters succeeded to the contract of Local 22382 (R. 32, 33) but reduces that agreement to an open-shop contract, and, thus contends that by holding the above described meetings and expressing his views, respondent assisted the Teamsters in recruiting new members.

It is obvious, of course, that if Local 22382 did have a closed-shop contract, as intervenors contend, no unlawful acts were committed. Once the Board grants that the Teamsters were the lawful bargaining representative of the employees, it must hold that the Company was under an obligation to recognize them. The Company's permission to address the employees to obtain proof of this status is merely an attenuated performance of this ob-

ligation. The Company's verbal statement to the employees that the Company had signed a contract with their authorized representative is nothing more than an academic announcement of the fulfillment of a statutory duty. The Company's acquiescence in the Teamsters' exhibition of the contract to the employees during a rest period is no more than a recognition of a customary and salutary right of the bargaining agent.

In view of the decision of the Board, therefore, the statements attributed to the Teamsters to the effect "If you boys (employees) don't sign up, you will be all sitting out in the park because this plant is going to be closed" (R. 50; 121, Petitioner's Brief, p. 10) and "* * * either you sign up or else * * * You know, out you go" (R. 51, 121) have absolutely no relevance to this proceeding for enforcement of the Board's order. There is not a shred of evidence that the statements were heard by the respondent's supervisors and cannot, therefore, be attributed to him. And, indeed, even if the statements were made with the *express approval* of the respondent they would be privileged if, as intervenors contend, respondent had a closed shop contract with Local 22382—since the Board does not controvert the fact that the Teamsters inherited the contract by virtue of the award of jurisdiction.

The same observation may be made of the discharge of Cedar on June 22, 1945, for failure to sign up with the Teamsters. (R. 50-53.) If the Teamsters had a closed-shop agreement with the respondent on this date, the discharge in pursuance of the agreement was simply the fulfillment of a statutory obligation.

Nevertheless, upon the finding that the agreement acquired by the Teamsters by virtue of the award of jurisdiction did not constitute a closed shop contract and upon the foregoing facts, the Board found that respondent rendered assistance to the Teamsters, in violation of Section 8 (1) of the Act (R. 33) and discharged Cedar in violation of Section 8 (3) and (1). (R. 34.)

The Board's order requires the respondent to cease and desist from encouraging membership in the Teamsters or any other organization, to reinstate Cedar with back pay and to post the usual notices of compliance. (R. 35-38.)

III. STATEMENT OF THE ISSUES.

The Board has properly confined the issues to a determination whether the respondent had a "closed-shop" agreement at the time the alleged acts of assistance and the discharge of Cedar occurred. The Board contends the acts were unlawful because the respondent did not have a closed-shop agreement during this period and tacitly admits the acts were lawful if it did. So narrowed, the issues may be succinctly stated:

(1) Does an agreement between an employer and a union providing:

(a) If the employer should have any non-union employee in his employ the employees may, without violating the agreement, refuse to work,

(b) The employer shall request evidence of membership in the Union of all employees and notify the

Union of any employee not presenting such evidence, and

(c) The Union shall notify the employer of any delinquent or suspended Union member or non-Union employee, and

(d) All new employees shall be hired through the Union, or required to join the Union within ten days, constitute a "closed-shop" agreement within the meaning of the National Labor Relations Act and

(2) If not a closed shop agreement by strict construction, is such an agreement sufficiently ambiguous to warrant the parties in regarding these provisions as collectively conditioning continued employment upon union membership and in administering the agreement as a "closed-shop" agreement.

IV. ARGUMENT.

A. THE BOARD'S FINDING THAT RESPONDENT AND THE INTERVENORS DID NOT HAVE A CLOSED-SHOP CONTRACT IS UNTENABLE.

1. The inclusion in the collective bargaining agreement of the provision permitting union members to lay down their tools if non-union members are employed is decisive evidence that the collective bargaining agreement between respondent and intervenors constituted a closed-shop contract.

In the instant case, the parties to the agreement utilized an ancient provision to denominate the existence of a closed-shop and, indicative of the overriding importance attached to this issue of union security, placed the provision as prefatory to all other union security pro-

visions in the contract. Section III of the agreement provides:

> *"It is recognized that the refusal of Union members to work with non-Union employees who are within the jurisdiction of the Local Union shall not constitute a violation of this agreement * * *."* (Appendix B, Petitioner's Brief, p. 31.)

The inclusion of this provision is, we submit, decisive of the question whether the parties to the agreement executed a closed-shop agreement: *this provision is the strongest concession that an employer can grant to assure the Union of maintenance of closed-shop conditions.*

The provision authorizes work stoppages for the enforcement of a closed-shop provision, and has been so recognized by commentators.[4] Indeed, it permits enforcement of the clause by the method of work stoppage which is even more drastic than a strike.[5]

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[4]"In a few industries, where bargaining is generally conducted with employers' associations, the strike has been accepted as a means of enforcing the agreement against recalcitrant members of the association. In such cases, *strikes against individual employers are permitted for enforcement purposes* and do not constitute a violation of the association agreement." (Italics supplied.) "Union Security Provisions", *Bulletin No. 686*, U.S. Department of Labor, Bureau of Labor Statistics, U.S. Government Printing Office (1942), p. 162. Thus, the Bureau of Labor Statistics notes that an employer association, in permitting employees to refuse to work if non-union persons are employed, assents to the enforcement of such an agreement as a closed shop.

[5]The distinction between a refusal to work and a strike is demonstrated by the following language from *New York Labor Relations Board v. Union Club of City of New York*, 268 App. Div. 516, 52 N.Y. Supp. (2d) 74 (1944): "What occurred here did not amount to a strike in the ordinary sense of the term. The employees did not leave the premises of the employer, but remained thereon. They did not choose to abandon their work until their demands were met." This case was reversed on other grounds in *New York State Labor Relations Board v. Union Club of City of New York*, 295 N. Y. 917, 68 N.E. (2d) 29 (1946).

Embodied only in the contracts of Unions having a long history of the strictest closed-shop conditions, it provides a *modus operandi* which would place an employer in the disastrous position of subjection to economic ruin if non-Union members are employed or retained. Clearly in the absence of such a closed-shop enforcement provision, the employees would not have this right to lay down their tools.[6] Nor can it be successfully maintained that an employer would *authorize* this cessation of operations during working hours and consequent increase in operating costs if he contemplated hiring or retaining a non-Union employee. Substantively, the Board is arguing that the employer, in effect, contemplated the retention or hiring of non-Union employees and concurrently authorized the Union employees—his entire working force—to lay down their tools if he did. The absurdity of ascribing such a schizophrenic intention to the bargaining parties is manifest.

Yet this absurdity is compounded and rendered more grotesque when the bargaining agreement is construed in conjunction with the provisions of the National Labor Relations Act and decisions thereunder.[7] Having author-

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[6]Thus in arbitration proceedings involving the United Automobile Workers and the Allis Chalmers Manufacturing Company arising out of the refusal of an employee to work alongside a prompter of a rival union and deserter from the CIO, arbitrator Lloyd Garrison after finding the bargaining agreement did not provide for a closed-shop, established the principle:

"A member of a labor organization (*in absence of closed-shop*) has no right to refuse to work with another man because the other man is a member of another labor organization."

Awards by Special Arbitrators, Rules on Union-Company Relations, 9 Labor Relations Reference Manual 833 (1941).

[7]It goes without saying that "the contracting parties are presumed to have had in view the statute upon the subject, and it must

ized the employees to lay down their tools if non-Union employees are employed, the employer would be powerless to terminate the stoppage by discharging the non-Union employee since such a discharge, according to the Board, would constitute an unfair labor practice under the doctrine of the Star Publishing Company case.[8] Nor could the employer discharge the idle employees and terminate the employer-employee relationship: the employees laid down their tools at his express and written authorization! Yet, according to the Board, the parties intended nothing less than this absurdity.

It is hornbook law that a contract is not to be construed to yield an unusual and extraordinary result. It is equally axiomatic that a contract will be presumed to have been drawn for the attainment of lawful objectives. The Board, by cavalierly dismissing this vital provision, has ascribed to the bargaining parties the desire to subject the respondent's plant to the hazard of economic destruction eventuating upon the whim of a single employee who fails to retain his Union membership, for the Board denies the employer any lawful means of terminating the consequent work stoppage.

The provision in question is a more stringent Union security clause than the usual closed-shop provision. In the event of a breach by the employer of a standard, explicit, yet bare, promise to maintain a closed-shop, the employees could:

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be held to enter into and become a part of their contract upon that subject, if the contract can be so construed". *Brown v. Kling,* 101 Cal. 295, 35 Pac. 995 (1894).

[8] *N.L.R.B. v. Star Publishing Co.,* 97 F. (2d) 465 (CCA 9), enforcing 4 N.L.R.B. 498.

(a) Waive the breach.

(b) Take legal action to enforce the agreement or obtain compensation for the breach.

(c) Strike to compel enforcement.

Under the present provision, the employees have the above alternatives and also the privilege of conducting a work stoppage until the non-union employee is dismissed. Insofar as a body of judicial decision exists to the effect that a work stoppage, as distinguished from a strike, to compel performance of a collective bargaining agreement is unlawful,[9] the inclusion in a collective bargaining agreement of employer authorization for such action is, indeed, far more advantageous to the Union than a less enforceable albeit more explicit promise that no non-Union employee will be retained.

2. The mechanics set forth in the agreement to implement the provision enabling the union members to lay down their tools if non-union members are employed are consonant only with the existence of a closed-shop agreement.

That the parties contemplated that this provision should operate as a closed-shop provision is clearly indicated by the mechanics set forth in the agreement by which the provision was to be enforced. Quoting further from Section III (a):

"(a) It is recognized that the refusal of Union members to work with non-Union employees who are within the jurisdiction of the local Union shall not

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[9]See: *New York Labor Relations Board v. Union Club of City of New York*, 268 App. Div. 516, 52 N.Y. Supp. (2d) 74 (1944) (see footnote 5, supra); *C. G. Conn, Ltd. v. National Labor Relations Board*, 108 Fed. (2d) 390 (CCA 7) (1939).

constitute a violation of this agreement, *provided,* however, that *before any strike action, job action, or other direct action* is taken on this account, the local Union will submit the matter for adjustment as provided in Section 8 hereof. *In order to aid in the prompt adjustment of such matters, the Union shall furnish its members with* a clearance card, dues book or other *evidence of paid-up membership,* and *when employees who are on the seniority lists, as defined in Section 9 hereof, are called to work, the employer will request that such evidence be presented by those who have it, and will keep a record, which will be available to the Union, of all employees who do not present such evidence. Similarly, the Union will from time to time, when such information is available, notify the employer of the names of delinquent or suspended members, or other non-Union employees, according to Union records.''* (Italics supplied.)

Paraphrasing the Board's essential contention that the above provision is consistent with the creation of an open shop, we find the employer not only *authorizing* economic action against his plant but also actively *assisting* in discovering grounds for commencing it! The employer must "keep a record" of employees who fail to join the Union, and he must make that record "available to the Union". When the record shows non-membership of a single employee, all employees are entitled to stop working. Can it be seriously contended that an employer would not only *authorize* a work stoppage but bind himself to the duty of furnishing the Union with the grounds for its commencement if his contract with the Union were intended to prevent the discharge of the offending employee, the source of the difficulty?

These provisions for checking and cross-checking for "evidence of paid-up membership", implementing the right to lay down tools if non-Union employees are retained, comprise nothing less than an implicit recognition of the requirement that such Union card be obtained and maintained by the employee. Obviously, unless the parties to the agreement contemplated the discharge of any non-Union employee, the mere determination of non-Union status would not "aid in the prompt adjustment" of a threatened exercise of the contractual privilege to cease work. The only possible method of "adjustment" and avoidance of strife is the discharge of the non-Union employee.

3. The inclusion of a preferential hiring clause and the institution of a voluntary check-off are additional strong indicia that the parties executed a closed-shop agreement.

Paragraph two of Section 3 (a) of the Agreement between the respondent and the intervenors provides:

> "The employer shall be the sole judge of the qualifications of all of its employees, subject to appeal as provided in Section 8 hereof, but in the selection of new employees the employer will give preference of employment to unemployed members of the Local Union, provided they have the necessary qualifications and are available when new employees are to be hired. 'New Employees', for the purpose of this agreement, are defined to be persons who are not on the seniority list of the hiring plant, as defined in Section 9 hereof, even though they may have been employed previously by said plant. As a basis for preferential consideration as new employees as aforesaid, unemployed members of the Local Union shall be required to present a clearance card from the

Local Union evidencing the fact of their paid-up membership. (If such Union members are not available for such employment, the employer may hire any person not a member of the Union provided that such person will be required to file an application for membership in the Local Union before being put to work. Upon filing such application he shall receive from the Union a written statement that he has made such application, which statement shall be taken up by the employer and returned to the Union when the applicant is put to work. It is further understood that such person must become a member of the Local Union within ten (10) days after his employment, and that the Local Union will not unreasonably refuse to accept such person as a member.)''

These provisions requiring Union membership of all new employees and also providing for preferential hiring through the Union are the usual ancillary provisions of closed-shop agreements. As stated by the Department of Labor:

> ''Provisions establishing some form of closed or preferential Union shop are frequently accompanied by provisions outlining the procedure to be followed in hiring new employees * * *.
>
> ''A time limit may be applied to the provision for hiring through the Union office. Thus, if sufficient persons cannot be furnished by the Union within a specified number of hours, the employer is allowed to secure workers from other sources * * *. *If a closed shop exists, workers hired in the open market must specify their willingness to join the Union, and are usually given a few days after employment within which to apply for membership.*''[10]

[10] ''Union Security Provisions'', supra, footnote 4, p. 27.

Similarly, although provision for a check-off was not incorporated in the agreement, the voluntary institution and maintenance of a check-off system for a considerable period of time is additional persuasive evidence that the parties believed they were administering a closed-shop agreement. As stated by the Department of Labor:

> "The check-off provision has no inherent connection with the type of recognition in existence. *As a rule, however, Unions which are well enough established to obtain a check-off system are likely also to have a closed or Union Shop.*"[11]

The inclusion of provisions that are common ancillaries to closed-shop agreements and the institution of a voluntary check-off are, counsel submit, strong and persuasive evidence that the parties contemplated, executed and administered an agreement providing for a closed-shop and rendered membership in the Union a condition of continued employment.

4. Any doubt whether the contract constituted a closed-shop should be resolved in accordance with the parties' interpretation and administration of the agreement.

In view of the foregoing analysis of the common practice in the negotiation of collective bargaining agreements and in view of the inclusion of the closed-shop provision permitting the Union employees to lay down their tools if non-Union members are employed, we submit that the Board must distort the agreement to construe it as an open shop. Giving it every benefit of doubt, the most the Board could contend would be that the agreement was not

[11]Ibid., p. 29.

clear. In that event, the declared interpretation and administration of the agreement as a closed-shop agreement would resolve the ambiguity.

The Board has placed major reliance upon one of its own decisions to buttress its findings that the agreement in question fails to satisfy the proviso to Section 8 (3) of the act. The case in question, *Matter of Iron Fireman Manufacturing Company,* 69 N.L.R.B. 19 (1946), involved an agreement incorporating a *single* Union security provision:

> "All new employees who are employed by the employer shall be given a trial period of thirty days or less. If found satisfactory at the expiration of thirty days, they shall make application to the Union."

Upon this single provision, the trial examiner held that, *in view of the parties' interpretation of the agreement* as constituting a closed shop, it would be so regarded by the Board. The Board refused to adopt this position, holding: (a) The provision fails to require the employee to become a member of the Union; (b) the provision fails to require the employee to remain a member of the Union; (c) even if the clause were regarded as sufficient to constitute a closed-shop, the employee in question had been discharged prior to the expiration of the thirty-day period.

In the present case, in addition to an express requirement that all new employees must become members of the Union, there are interrelated provisions for determining the Union status of *all* employees, a preferential hiring clause, and the overriding provision that Union mem-

bers may refuse to work if non-Union members are employed. The agreement is not, therefore, comparable to the agreement in the *Iron Fireman* case and cannot be constricted to the confines of that decision.

A more comparable Board decision is *Matter of M & J Tracy, Inc.,* and *Inland Boatmen's Union,* 12 N.L.R.B. 316 (1939). In the mentioned case, the only Union security provision was the phrase: "All members of party of second part (the Union) to be given preference of all work. * * *" The Board, after declaring the contract to be ambiguous, finally resolved the ambiguity as providing for a Union shop.

Although we believe that the respondent's contract is unequivocal in its declaration of a closed-shop agreement, we submit that even if we assume its ambiguity, the parties' adopted and reasonable construction of the contract must control. Any doubts as to the operative effect of the agreement should be resolved in accordance with their interpretation and administration of the agreement.

The Board, itself, before advancing its present position as to the contract, has engaged in considerable vacillation and contradiction as to its meaning. Its decisions, predicated on an examination of the Master Agreement, manifest a pendulum of interpretation that has made a full swing. Thus in its supplemental decision and order, rendered February 15, 1946, in the Bercut-Richards case, the Board, referring to the Master Agreement, stated:

> "In this state of the record, no legal aspect may be given the *closed-shop provision contained in the current collective agreements* * * *." (R. 229.)

The complaint issued by the Board on April 23, 1946, which is the very basis for this entire proceeding, describes the contract as one requiring membership in the Union as a condition of employment:

> "On or about May 18, 1945, the respondent entered into a contract with the Teamsters, recognizing that organization as the exclusive collective bargaining representative of the respondent's employees, and requiring membership in the Teamsters as a condition of employment." (R. 8.)

During the course of oral argument in the instant case, the Trial Examiner expostulated:

> "Are you drawing no distinction whatsoever, Mr. Tobriner, between the International Brotherhood of Teamsters, which was given a contract by this company on May 18, 1945, and *Local 22382 which had previously had a closed shop contract with the company for many years?*" (R. 245.)

The Trial Examiner, in the Intermediate Report, to buttress his findings of unfair labor practices, *placed major reliance* on the position that the contract between the Teamsters and the respondent failed because of unlawful assistance, urging the proposition as to the alleged open shop nature of the contract only as a secondary and supplementary contention. (R. 59.)

Refusing to pass upon the major position of the Trial Examiner, the Board, in the present case, relying exclusively on the second point, found the respondent's conduct unlawful *solely* on the ground that *"neither Local 22382 nor the Teamsters had a closed shop agreement"*. (R. 33.)

In view of its own record of uncertainty, the Board is in no position to assert that the agreement is "unmistakably clear" and cannot be construed as other than an open shop. In any event, it is elementary that when the meaning of the language of a contract is doubtful the acts of the parties performed under it afford one of the most reliable clues to their intent.[12]

That the parties regarded the contract as establishing a closed shop is manifest from an examination of the record. As stated by respondent's superintendent: "The employees coming under that contract were required to maintain good standing in the Cannery Workers Union." (R. 174.) Again, respondent's superintendent indicated that this interpretation was based on the agreement in question. (R. 198.) That the Union regarded the contract as constituting a closed shop is amply evidenced by the letter requesting the dismissal of Gus Cedar:

> "* * * This man has refused to become a member of this Union and under the terms of our contract he is subject to dismissal * * *" (R. 191-192.)

The Board rejected this evidence as "unsupported" (R. 34, n. 3) although there is no testimony or evidence in conflict with the parties' statement other than the assertion of Gus Cedar, the CIO witness, that he was not aware of any requirement that members of the Union were to maintain their membership in the Union. Cedar's statement, however, must be regarded in the light of his subsequent admission that he knew little about the contract with the respondent or the position of the Union. (R. 141,

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[12]See: *Hill v. McKay*, 94 Cal. 5 (1892); *Rockwell v. Light*, 6 Cal. App. 563 (1907); *Whitney v. Aronson*, 21 Cal. App. 9 (1913).

152.) That the Board may not reject evidence on mere suspicion or inference is amply indicated by decisions upsetting the rulings of the Board.[13]

Thus, the basic position of intervenors is established by an examination of the agreement and a determination that the parties actually provided for a closed shop, or, in the alternative, a scrutiny of their administration and interpretation of the agreement. The agreement between respondent and intervenors made membership in the Union a condition of employment within the meaning of the proviso to 8 (3).

5. The Board has not followed its doctrine of strict construction in previous proceedings.

Woven into the fabric of the Board's argument is a thread of innuendo to the effect that the closed-shop provision in a collective bargaining agreement must be written in express, unequivocal and standard language. It must be initially recognized, however, that in the instant agreement the phrase in question permitting Union members to lay down their tools was incorporated in the agreement at a time when the language of collective bargaining agreements was still in a formative stage.[14]

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[13]See: *National Labor Relations Board v. McGough Bakeries Corp.*, 153 Fed. (2d) 420 (C.C.A. 5) (1946); *Interlake Iron Corp. v. National Labor Relations Board*, 131 Fed. (2d) 129 (C.C.A. 7) (1942).

[14]"Union Agreement Provisions", supra, footnote 4, the first sizeable collection of union security clauses, was issued in 1942. The Bureau of National Affairs did not commence its "Collective Bargaining and Negotiations" service until 1945. Early cases before the Board indicate that parties frequently believed they were writing a closed-shop agreement although the language they employed only provided for preferential shop. See: Matter of *Ansley Radio Corporation and Local 1221, Electrical and Radio Workers*

Furthermore, the Supreme Court has tacitly recognized the validity of *oral* agreements for a closed shop[15] and, indeed, the Board has construed as "closed-shop agreements" written collective bargaining contracts *providing only for preferential hiring* when the parties, in good faith, regarded the agreement as containing a closed-shop provision.

Thus in *Ansley Radio Corporation and Local 1221 United Electrical and Radio Workers of America,* 18 N.L.R.B. 1028, the Board, refusing to declare a preferential hiring agreement as insufficient to constitute a closed-shop agreement in view of the parties' declared construction of their contract, stated:

> "Effectuation of the purposes and policy of the Act requires that in such instances the determination of whether the respondent has engaged in an unfair labor practice should not depend upon a fact which is contrary to the understanding of the employer and all persons concerned * * *" (18 N.L.R.B. at 1031.)

Again, in *Matter of General Furniture Manufacturing Company* and *Furniture Workers Union Local 1007,* 26 N.L.R.B. 74 (1940), the written agreement provided:

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of America, 18 N.L.R.B. 1028 (1939); *Matter of General Furniture Manufacturing Co. and Furniture Workers' Union Local 1007,* 26 N.L.R.B. 74 (1940) discussed infra pp. 27-28. The instant union security provisions were first incorporated in the agreement in 1941.

[15]See: *National Labor Relations Board v. Electric Vacuum Cleaner Co.,* 315 U.S. 685, 62 S.Ct. 846 (1942), wherein the Court discussed at length whether the parties had "abandoned" an oral closed shop contract. The Board has explicitly held that an oral agreement is sufficient to satisfy the proviso to 8 (3) of the Act. *United Fruit Co. and International Longshoremen and Warehousemen's Union,* 12 N.L.R.B. 404 (1939); *Taylor Milling Co. and Avery Smith and James L. Wykes,* 26 N.L.R.B. 424 (1940).

"In filling vacancies or hiring new help, the COMPANY agrees to give preference to members of the UNION. If UNION men who are satisfactory to the COMPANY are not available, the COMPANY may then hire whom they desire providing such employees join the UNION within thirty (30) days of being given employment." (26 N.L.R.B. at p. 79.)

Quoting from the findings of the Board in the mentioned case:

"The respondent and Local 2097 contend that by Article V of the contract the respondent was obligated to require Union membership of all its employees, those in its employ at the time the contract was entered into as well as those hired thereafter. *The provision, on its face, however, appears to refer to only preferential hiring of new or additional employees through the Union and does not appear to establish a closed shop as the respondent and Local 2097 contend.* However, clear and convincing proof was adduced at the second hearing that the parties *mutually intended and agreed* in the agreement reached by them * * * and which they supposed was expressed in the instrument then executed that the respondent require of all production workers then in its employ and thereafter union membership as a condition of employment * * *" (26 N.L.R.B. at p. 79.)

The Board concluded, on page 80:

"Under these circumstances the contract will be considered for the purposes of this proceeding as a closed-shop contract, as if it expressly set forth the respondent's undertaking."

If the Board is willing to regard an unequivocal written preferential hiring agreement as constituting a closed shop, intervenors are at a loss to understand the Board's sudden position that an agreement providing for preferential hiring, supplemented by provisions for inquiring into and determining the Union status of all employees *and* containing the traditional closed-shop provision permitting Union employees to refuse to work if non-Union employees are employed—an agreement regarded by the parties as a closed-shop agreement—is insufficient to satisfy the proviso to Section 8 (3) of the Act.

In any event, the cases cited by the Board (Petitioner's Brief, p. 23) as to the alleged immateriality of the conduct and interpretation of the parties hardly apply in view of the Board's established principle in the above cited cases that the agreement will be construed to effectuate the intention of the parties, regardless of the language employed.

B. THE OTHER CONTENTIONS OF THE BOARD ARE WITHOUT MERIT.

The Board has relied upon a series of cases commencing with *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385 (1945) as precluding this Honorable Court from inquiring into the validity of the order of reinstatement of Gus Cedar and the propriety of all portions of its order to which the respondents and the Teamsters failed to make specific exception.

The fallacy in the argument is manifest. Section 10 (e) of the Act provides, *inter alia:*

> "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to *questions of fact* if supported by substantial evidence on the record considered as a whole shall be conclusive." (Italics added.)

The finality of the Board's rulings and order must be bottomed on *findings of fact*. The issue in the present case is not an issue of fact but an issue of law—the construction of a contract. As stated in *Aluminum Co. of America v. N.L.R.B.* (CCA-7), 159 Fed. (2d) 523 (1946), wherein the Board had construed a closed-shop contract as inoperative and then sought enforcement of a reinstatement order:

> "It is an elementary rule not requiring citation of authorities that the construction and meaning of a written contract is a question of law. * * * The problem in the instant case does not center about the drawing of inferences from surrounding circumstances, but instead it requires an interpretation of the language of the addendum itself * * *"

After examining the addendum and holding the closed-shop contract to be in effect, the Court rejected the Board's contention that the issues involved findings of fact, deemed inapplicable cases now advanced by the Board[16] and refused enforcement, stating:

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[16] "The cases cited by the Board, National Labor Relations Board v. Electric Vacuum Cleaner Co., supra; Wallace Corp. v. National Labor Relations Board, 323 U.S. 248; National Labor Relations Board v. Link-Belt Co., supra, admittedly are inapplicable if the

"It is apropos at this point to note that the Board's order appears to be founded upon a misinterpretation of the Act and thereby fails to effectuate its policies. Among other things the Act was designed to strengthen the Unions in their dealings with the employers. The closed-shop proviso is an example. But while the Act protects individual Union members from discriminatory discharge *it strains the imagination to see where in the Act Congress has intended that discharges made pursuant to a valid Union security contract should in themselves constitute an unfair labor practice.* It would appear that the effect of this order is that the Board is seeking to protect a recalcitrant member from his Union's discipline. The Supreme Court, we believe, anticipated this situation in *Virginia Electric & Power Co. v. National Labor Relations Board,* 319 U.S. 533, when it said:

> 'It (Board's judgment) should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' "

That an order of the Board must be denied enforcement if bottomed on an erroneous conclusion of law is likewise implicit in the decision in *N.L.R.B. v. Cheney Lumber Co.,* supra, wherein Justice Frankfurter, speaking for the Court, deemed the decision in the case inapplicable "if the Board has patently travelled outside the orbit of its authority so that there is, legally speaking, no order to enforce." (p. 388.)

To maintain that even if the contract between the Teamsters and the respondent constituted a closed shop agree-

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discharge is pursuant to an existent closed-shop agreement untainted by any unfair labor practice." *Aluminum Co. of America v. National Labor Relations Board,* supra, at p. 526.

ment, the order requiring the reinstatement of Gus Cedar must stand is, counsel submits, an attempt by the Board to "achieve ends other than those which can fairly be said to effectuate the policies of the Act."

Nor is this a case wherein the parties to the proceeding failed to raise the issue of the construction of the contract.

It was raised by respondents in their answer (R. 21) and in oral argument by respondent (R. 230, 253) and by the Teamsters. (R. 241, 256.) The argument was considered by the Trial Examiner (R. 53-58) and by the Board. (R. 34.) The parties have, therefore, complied with both the spirit and the letter of Section 10 (e) of the Act.

Nor may the Board obtain any satisfaction from the cases establishing the principle that even if the parties had a closed-shop contract, employer discrimination is not permissible where it would result in a denial to employees of the fundamental freedom to select representatives and the protection against discrimination, which the Act as a whole was designed to afford. (See Petitioner's Brief, p. 32.) The case of *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248 (1944), cited by the Board (p. 32), involved a discharge of an employee at the request of the Union although the employer knew that the employee was denied membership in the Union because of his activities on behalf of a rival Union. In the instant case, there is nothing other than the standard enforcement of a closed shop agreement. The employee had failed to retain his membership in the Union although membership in the Union was a condition of employment.

CONCLUSION.

The Board's petition in this case rests upon an erroneous construction of the written agreement between respondent and intervenors. The agreement, on its face, constitutes a closed-shop agreement, but, even if it carries any latent ambiguity, the ambiguity should be resolved in accordance with the interpretation and conduct of the parties. The Board's attempt to deny vitality to the agreement and to dismiss the parties' conduct under it in proving the proper interpretation of the agreement is, counsel believes, an unsupportable doctrine.

We submit that the logical construction of the agreement, as well as the underlying postulates for industrial peace, require the dismissal of the petition.

Dated, San Francisco, California,
November 1, 1948.

Respectfully submitted,
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